

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

INITIAL STATEMENT OF REASONS

Subject Matter of Proposed Regulations:
Workers' Compensation – Audit Regulations

TITLE 8, CALIFORNIA CODE OF REGULATIONS SECTIONS 10100.2, ET SEQ.

Proposed section 10100.2	Definitions
Proposed section 10103.2	Claim Log – Contents and Maintenance
Amended section 10104	Annual Report of Inventory
Amended section 10105	Auditing, Discretion of the Administrative Director
Proposed section 10106.1	Routine and Targeted Audit Subject Selection; Complaint Tracking; Appeal of Targeted Audit Selection
Proposed section 10107.1	Notice of Audit; Claim File Selection; Production of Claims Files; Auditing Procedure
Amended section 10108	Audit Violations – General Rules
Amended section 10109	Duty to Conduct Investigation; Duty of Good Faith
Proposed section 10111.2	Full Compliance Audit Penalty Schedule; Target Audit Penalty Schedule
Amended section 10113	Order to Show Cause Re: Assessment of Civil Penalty and Notice of Hearing
Proposed section 10113.1	Answer to Order to Show Cause
Proposed section 10113.2	Amended Complaint or Supplemental Order to Show Cause Before Submission of Case
Proposed section 10113.3	Administrative Director's Designation of Hearing Officer
Proposed section 10113.4	Written Statement and Supporting Evidence
Proposed section 10113.5	Prehearing Conference; Subject Matter; Prehearing Order
Proposed section 10113.6	Subpoenas
Amended section 10114	Hearing
Proposed section 10114.1	Evidence; Examination of Witnesses
Proposed section 10114.2	Affidavits
Proposed section 10114.3	Oaths
Proposed section 10114.4	Determination
Amended section 10115.1	Appeal of Notice of Penalty Assessment – Filing and Contents
Repealed section 10115.3	Appeal of Civil Penalty

BACKGROUND TO REGULATORY PROCEEDING:

Labor Code Sections 129 and 129.5 have been amended, effective January 1, 2003. Labor Code sections 129 and 129.5 authorize the Administrative Director to audit and impose penalties against claims administrators who fail to meet their obligations to promptly and accurately provide injured workers with the compensation to which they are entitled. In order to comply with the legislative changes to Labor Code sections 129 and 129.5, the following new and amended regulations are required.

Amended Section 10100.2 Definitions

Problem Addressed:

Labor Code section 129.5(e) authorizes the Administrative Director to assess civil penalties against claims administrators upon finding, after hearing, that the claims administrator has *knowingly committed* or has performed with a frequency as to indicate a *general business practice* specific unlawful activities.

However, at present, there is no regulation that defines the terms “general business practice,” or “knowingly committed,” as used in the Labor Code or the Regulations.

The proposed regulation, which will apply to injuries occurring on or after January 1, 2003, also includes definitions previously listed in section 10100.1 and also contains amended definitions of the terms “adjusting location,” “audit subject,” “claim,” “claim file,” “indemnity claim,” “insurer,” “investigation,” and “third party administrator.” These terms are used in Labor Code section 129 and 129.5 and the audit regulations. Clear definitions will avoid confusion among the regulated community and help prevent disputes.

Specific Purpose of Amended Section 10100.2:

The proposed regulation will apply to injuries occurring on or after January 1, 2003. It includes definitions previously listed in section 10100.1 and also contains amended definitions of the terms “adjusting location,” “audit subject,” “claim,” “claim file,” “insurer,” “investigation,” and “third party administrator.” The proposed amended regulation will define the terms “general business practice,” and “knowingly committed.” These terms are used in Labor Code sections 129 and 129.5 and the audit regulations.

Necessity:

Labor Code section 129.5(e) (effective January 1, 2003) authorizes the Administrative Director to assess civil penalties against claims administrators

upon finding, after hearing, that the claims administrator has *knowingly committed* or has performed with a frequency as to indicate a *general business practice* specific unlawful activities.

However, at present, there is no regulation that defines the terms “general business practice,” or “knowingly committed,” as used in the Labor Code or the Regulations.

The proposed regulation, which will apply to injuries occurring on or after January 1, 2003, also includes definitions previously listed in section 10100.1 and also contains amended definitions of the terms “adjusting location,” “audit subject,” “claim,” “claim file,” “indemnity claim,” “insurer,” “investigation,” and “third party administrator.” Changes have been made to the definitions in order to clarify the terms or to comply with the changes in Labor Code sections 129 and 129.5.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers’ Compensation relied upon the CHSWC report on the DWC Audit Function and input from the auditors who review claims files.

Business Impact:

Because the proposed change to this section is the addition of definitions of terms used in the regulations and statutes, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Proposed Section 10103.2 Claim Log – Contents and Maintenance

Problem Addressed:

Labor Code section 129 (effective 1/1/03) requires that each audit subject be audited at least once every five years. Files to be audited are chosen randomly from the claims administrator’s claims log. In the past, after certain files were chosen from the claim log, the claims administrator explained that the files had been transferred to different location. The Audit Unit was then required to substitute a new file in order to have the correct amount of files to audit. This

proposed regulation, which is based on the current regulation, includes subdivision (7) requiring the claims administrators to list the location of any transferred file.

Specific Purpose of Proposed Section 10103.2:

Current regulations require a claims administrator to maintain a claim log that lists information pertaining to all work injury claims. Proposed Section 10103.2 will apply to claim log maintenance on or after January 1, 2003. For profile audit reviews conducted pursuant to Labor Code section 129(b)(1), the Audit Unit will randomly select samples of indemnity files from the claim logs. Thus, it is necessary for the audit subject to prepare a claim log as required by this regulation. In addition to the requirements that are contained in the current regulation, if a claim has been transferred to another location, this regulation will now require the claims administrator to indicate the new location on the log. Additionally, the new location's claim log must list the claim for the year that the claim was initially reported, not the year the claim was transferred.

Necessity:

Labor Code section 129 (effective 1/1/03) requires that each audit subject be audited once every five years. Once the audit subject has been chosen, the Audit Unit is required to randomly choose files to audit. This regulation requires the audit subject to list the files and certain information about the files, so that the Audit Unit can select the files to audit. In the past, after certain files were chosen from the claim log, the claims administrator explained that the files had been transferred to different location. The Audit Unit was then required to substitute a new file in order to have the correct amount of files to audit. This proposed regulation, which is based on the current regulation, includes subdivision (7) requiring the claims administrators to list the location of any transferred file in order to prevent having to replace randomly selected files because they were transferred.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the CHSWC report on the DWC Audit Function, and input from the auditors who review claim files.

Business Impact:

Because the proposed change to this section is the requirement to report the which where a file has been transferred to, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Amended Section 10104 Annual Report of Inventory

Problem Addressed:

Labor Code section 129 (effective 1/1/03) requires that each audit subject be audited at least once every five years. It also authorizes target audits conducted in accordance with the target audit criteria adopted by the Administrative Director. Labor Code section 129.5(b)(7) (effective 1/1/03) provides that the administrative director shall promulgate regulations establishing a schedule of penalty amounts. One of the factors for the penalty amounts is the size of the adjusting locations.

The Annual Report of Inventory provides the Audit Unit with the name of each adjusting location, which will allow the Audit Unit to schedule an audit of each adjusting location once every five years. The amended section 10104 requires reports due on or after April 1, 2003 to report the numbers of indemnity, denied and medical only claims reported to the claims administrator. This information will allow the audit unit to create a target audit criteria and will provide the Audit Unit with the information necessary to determine the size of the adjusting locations.

Specific Purpose of Amended Section 10104:

The Annual Report of Inventory provides the Audit Unit with the name of each adjusting location, which will allow the Audit Unit to schedule an audit of each adjusting location once every five years. The amended section 10104 requires reports due on or after April 1, 2003 to report the numbers of indemnity, denied and medical only claims reported to the claims administrator. This information will allow the audit unit to create a target audit criteria and will provide the Audit Unit with the information necessary to determine the size of the adjusting locations.

Necessity:

Labor Code section 129 (effective 1/1/03) requires that each audit subject be audited once every five years. Labor Code section 129.5 (effective 1/1/03)

requires that penalty amounts be based on, among other factors, the size of the adjusting location. The changes in the amended regulation concerning the annual report of inventory will allow the Audit Unit to schedule an audit of each adjusting location every five years and will allow the Audit Unit to determine the size of the adjusting locations.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the CHSWC report on the DWC Audit Function, and input from the auditors who review claim files.

Business Impact:

Because the proposed change to this section is the requirement to report the numbers of indemnity, denied and medical-only claims (as opposed to previous requirement to report the total number of claims); the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Amended Section 10105

Auditing, Discretion of the Administrative Director

Problem Addressed:

Labor Code section 129.5 requires the Administrative Director to conduct civil penalty hearings and appeals of notices of penalty assessments. In order to conduct hearings, the Administrative Director must have the power to issue subpoenas, administer oaths, and delegate authority. In the past, audit subjects have argued that the Administrative Director did not have the power to delegate authority or have certain powers relating to conducting investigations and hearings. Although Labor Code section 133 provides a broad power to the Administrative Director to do all things necessary, the provisions of the Government Code sections 11180 through 11191 specifically set forth the powers required in order to conduct investigations and hearings.

Specific Purpose of Amended Section 10105:

Section 10105 is amended to provide that the Administrative Director may utilize the provisions of Government Code sections 11180 through 11191. These sections confer onto the head of an agency the power to conduct investigations and hearings, including issuing subpoenas, administering oaths, and delegating authority.

Necessity:

Labor Code section 133 provides that the Administrative Director shall have the power and jurisdiction to do all things necessary required by the Labor Code, which includes conducting investigation and hearings. Labor Code section 129.5 requires the Administrative Director to conduct civil penalty hearings and appeals of notices of penalty assessments. In order conduct hearings, the Administrative Director must have the power to issue subpoenas, witnesses, administering oaths, and delegating authority. By providing that the Administrative Director may utilize the provisions of Government Code sections 11180 through 11191, it will be clear that the Administrative Director has the power necessary to conduct investigations and hearings.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute.

Business Impact:

Because the proposed change to this section provides that the Administrative Director may utilize the provisions of Government Code sections 11180 through 11191 (which confers the authority to conduct investigations and hearings), the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Proposed Section 10106.1

Routine and Targeted Audit Subject Selection; Complaint Tracking; Appeal of Targeted Audit Selection

Problem Addressed:

Labor Code Sections 129 and 129.5 (effective 1/1/03) require (1) that each audit subject be audited at least once every five years; (2) that the Administrative Director annually establish a profile audit review performance standard that will identify the poorest performing audit subjects; (3) that the Administrative Director annually establish a full compliance audit performance standard that will identify the audit subjects that are performing satisfactorily; (4) that any full compliance audit subject that fails to meet or exceed the full compliance audit performance standard shall be audited again within two years; (5) that the Administrative Director develop target audit criteria; and (6) that the Administrative Director shall publish and make available to the public a list ranking all insurers, self-insurers, and third-party administrators audited during the period according to their performance measured by the profile audit review and full compliance audit performance standards.

This proposed section sets forth procedures for selecting a subject for audit in compliance with the above listed mandates set forth in Labor Code section 129 and 129.5. The section also provides the procedure for appealing the notice of a targeted audit.

Specific Purpose of Amended Section 10106.1:

The purpose of proposed Section 10106.1 is provide the procedure for selecting a subject for audit in compliance with Labor Code section 129 and 129.5, effective 1/1/03.

Necessity:

Labor Code Sections 129 and 129.5 (effective 1/1/03) require (1) that each audit subject be audited at least once every five years; (2) that the Administrative Director annually establish a profile audit review performance standard that will identify the poorest performing audit subjects; (3) that the Administrative Director annually establish a full compliance audit performance standard that will identify the audit subjects that are performing satisfactorily; (4) that any full compliance audit subject that fails to meet or exceed the full compliance audit performance standard shall be audited again within two years; (5) that the Administrative Director develop target audit criteria; and (6) that the Administrative Director shall publish and make available to the public a list ranking all insurers, self-insurers, and third-party administrators audited during the period according to their performance measured by the profile audit review and full compliance audit performance standards.

The proposed regulation sets forth procedures for selecting a subject a subject for audit in compliance with the mandates required by Labor Code sections 129 and 129.5.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the CHSWC report on the DWC Audit Function, and input from the auditors who review claim files.

Business Impact:

This regulation changes the procedure for selecting a subject for audit. However, under the current regulations, all claims administrators are subject to random and non-random audits. Therefore, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

**Proposed Section 10107.1 Notice of Audit; Claim File Selection;
Production of Claims Files; Auditing
Procedure**

Problem Addressed:

Labor Code Sections 129 and 129.5 (effective 1/1/03) require (1) that each audit subject be audited at least once every five years; (2) that the Administrative Director annually establish a profile audit review performance standard that will identify the poorest performing audit subjects; (3) that the Administrative Director annually establish a full compliance audit performance standard that will identify the audit subjects that are performing satisfactorily; (4) that any full compliance audit subject that fails to meet or exceed the full compliance audit performance standard shall be audited again within two years; (5) that the Administrative Director shall publish and make available to the public a list ranking all insurers, self-insurers, and third-party administrators audited during the period according to their performance measured by the profile audit review and full compliance

audit performance standards; (6) that penalties will not be assessed against audit subjects that meet or exceed the profile audit review performance standards, but unpaid compensation must be paid; (7) that penalties will be assessed only for violations involving late-paid and unpaid compensation on those audit subjects that meet or exceed full compliance audit performance standards, and unpaid compensation must be paid; and (8) that penalties for all violations will be assessed against those audit subjects that do not meet or exceed full compliance audit performance standards, and unpaid compensation must be paid.

Therefore, a regulation is required that addresses the above mandates and set forth the procedure for noticing audits, selecting claim files to be audited, calculating the audit subject's profile audit review performance rating, calculating the audit subject's full compliance performance audit rating, and setting forth the auditing procedure.

Specific Purpose of Proposed Section 10107.1:

This proposed section describes the process for conducting audits on or after January 1, 2003, in order to comply with the legislative changes made to Labor Code sections 129 and 129.5 effective January 1, 2003. It sets forth the procedure for noticing an audit and the sampling methodology for selecting the claims that will be audited. The section sets forth the procedure for calculating the audit subject's profile audit review performance rating. The section provides the method to determine the profile audit review performance rating of each audit and to establish a profile review audit performance standard each year. Those who meet or exceed the performance standard will not be assessed any administrative penalties; however, they will be issued Notices of Compensation Due pursuant to section 10110.

This section also provides the procedure for conducting Full Compliance Audits and the sampling methodology for selecting the claims that will be audited. The section sets forth the procedure for calculating the audit subject's full compliance audit performance rating and determining the full compliance audit performance standard each year.

Necessity:

Labor Code Sections 129 and 129.5 (effective 1/1/03) require (1) that each audit subject be audited at least once every five years; (2) that the Administrative Director annually establish a profile audit review performance standard that will identify the poorest performing audit subjects; (3) that the Administrative Director annually establish a full compliance audit performance standard that will identify the audit subjects that are performing satisfactorily; (4) that any full compliance audit subject that fails to meet or exceed the full compliance audit performance standard shall be audited again within two years; (5) that the Administrative

Director shall publish and make available to the public a list ranking all insurers, self-insurers, and third-party administrators audited during the period according to their performance measured by the profile audit review and full compliance audit performance standards; (6) that penalties will not be assessed against audit subjects that meet or exceed the profile audit review performance standards, but unpaid compensation must be paid; (7) that penalties will be assessed only for violations involving late-paid and unpaid compensation on those audit subjects that meet or exceed full compliance audit performance standards, and unpaid compensation must be paid; and (8) that penalties for all violations will be assessed against those audit subjects that do not meet or exceed full compliance audit performance standards, and unpaid compensation must be paid.

This proposed regulation is required to address the above mandates and set forth the procedure for noticing audits, selecting claim files to be audited, calculating the audit subject's profile audit review performance rating, calculating the audit subject's full compliance performance audit rating, and setting forth the auditing procedure.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the CHSWC report on the DWC Audit Function, and input from the auditors who review claim files.

The tables, which indicate the numbers of files to be selected for random sampling, are the same as those currently found in Regulation section 10107. The numbers used in the tables are based on the formula in the National Association of Insurance Commissioners (NAIC) Handbook, and were based on an expected rate of occurrence (expected frequency) not over 10%, reliability of plus or minus 5%, and a confidence level of 80%. The table for full sample indemnity claims was based on an expected rate of occurrence (expected frequency) not over 10%, reliability of plus or minus 5%, and a confidence level of 95%. The sample tables were generated by a software program obtained from the Centers for Disease Control (CDC), and is designed as Epi Info (for Epidemiology Information) software. The application within the program is titled *Population Survey*.

Business Impact:

The regulation, which provides the procedure for calculating an audit subject's profile audit review performance rating and full compliance performance audit rating, will not have a significant impact on businesses because only the worst (approximately) twenty per cent of the performers will be subject to audit penalties. Presently, all audited claims administrators are subject to audit penalties.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Amended Section 10108

Audit Violations – General Rules

Problem Addressed:

In the past, confusion and/or specific disputes have arisen during audits concerning various procedures and issues. These include (1) what happens when a correction made by the claims administrator to a claim file before the audit is complete; (2) what is the mileage rate to be paid; (3) are penalties assessed for failure to pay indemnity in an amount less than ten dollars aggregate per file; (4) does an administrative penalty bar a civil penalty; (5) is a companion claim to a randomly selected claim considered randomly selected for purposes of determining whether or not the audit subject meets or exceeds performance standards; (6) may penalties be assessed for failure to timely submit an accurate Annual Report of Inventory; (7) may the penalty for late performance of an act exceed the penalty for failure to perform an act; (8) if more than one claims administrator has adjusted a claim file, will penalties be assessed for violations which occurred before the audit subjects began adjusting the claim; and (9) will successor liability be imposed on subsequent claims administrators if there has been a substantial continuity of business and/or the successor business uses substantially the same work force? The amendments to this regulation are intended to clarify these issues.

Specific Purpose of Amended Section 10108:

This section provides the general rules that apply to all audits. It is amended to clarify: (1) that audit penalties will be based on an audited claim's status when the claim is audited; (2) that the mileage rate is thirty four cents (increased from twenty one cents) in compliance with the current law; (3) that the audit unit will not assess penalties for violations for failure to make payment of indemnity due if the total is less than ten dollars aggregate per file; (4) that nothing in the regulations bars the assessment of a civil penalty under Labor Code section 129.5; (5) that the Audit Unit may audit a companion or master claim to a randomly selected claim and consider that claim as randomly selected for purposes of determining whether or not the audit subject meets or exceeds performance standards; (6) that penalties may be assessed for failure to timely

submit an accurate Annual Report of Inventory; (7) that penalties for late performance of an act may not exceed the penalty for failure to perform an act; (8) that if more than one claims administrator has adjusted a claim file, penalties will not be assessed for violations which occurred before the audit subjects began adjusting the claim, except with regard to failure to pay compensation due; and (9) that successor liability will be imposed on subsequent claims administrators if there has been a substantial continuity of business and/or the successor business uses substantially the same work force.

The purpose of amending this regulation is to reduce disputes regarding any of the above listed issues.

Necessity:

The Legislature adopted Labor Code sections 129 and 129.5 to ensure that injured workers receive promptly and accurately the full measure of compensation to which they are entitled. Labor Code section 129.5 authorizes the Administrative Director to assess penalties against claims administrators for failure to comply with the workers' compensation laws and to promulgate regulations establishing a schedule of violations and the amounts of the penalties.

In order to reduce potential disputes regarding audit procedures and penalties, the proposed amendments to Regulation 10108 (listed above) have been made.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the CHSWC report on the DWC Audit Function, and input from the auditors who review claim files.

Business Impact:

Because the amended regulation is designed to reduce disputes and confusion, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Amended Section 10109

Duty to Conduct Investigation in Good Faith

Problem Addressed:

Labor Code section 129.5(b) authorizes the Administrative Director to promulgate regulations establishing a schedule of violations and the amount of the administrative penalties to be imposed for each violation. One of the factors to be considered in determining the amount of the penalties is the *good faith* of the claims administrator. Regulation section 10108(c) allows for a mitigation of penalties for *good faith*. Regulation section 10109(e) requires claims administrators to deal fairly and in *good faith* with all claimants. Regulation section 10111.1(e) discusses the application of a modification for *good faith*.

However, at present, there is no regulation that defines the term “good faith.”

Specific Purpose of Amended Section 10109:

The purpose of this amended section is to define “acting in good faith.”

Necessity:

Labor Code section 129.5(b) authorizes the Administrative Director to promulgate regulations establishing a schedule of violations and the amount of the administrative penalties to be imposed for each violation. One of the factors to be considered in determining the amount of the penalties is the *good faith* of the claims administrator. Regulation section 10108(c) allows for a mitigation of penalties for *good faith*. Regulation section 10109(e) requires claims administrators to deal fairly and in *good faith* with all claimants. Regulation section 10111.1(e) discusses the application of a modification for *good faith*.

The regulation is necessary because, at present, there is no regulation that defines the term “good faith.”

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers’ Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the CHSWC report on the DWC Audit Function, and input from the auditors who review claims files.

Business Impact:

Because the proposed change to this regulation is the addition of a definition of the term used in the regulation, the amended regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Proposed Section 10111.2 Full Compliance Audit Penalty Schedules; Target Audit Penalty Schedule

Problem Addressed:

Effective 1/1/03, Labor Code section 129.5 requires audit penalties to be based on additional factors, including whether the audit subject has met or exceeded the profile audit review performance standard; whether a full compliance audit subject has met or exceeded the full compliance audit performance standard; and the size of the audit subject location. For full compliance audit penalties, Labor Code section 129.5 will allow the imposition of penalties up to \$40,000. No administrative penalties are to be imposed on audit subjects that pass the performance audit review. If an audit subject failed the performance audit review, but passes the full compliance audit, only penalties for unpaid or late paid compensation will be imposed.

The current regulations do not provide procedures that comply with amended Labor Code section 129.5. Proposed section 10111.2 sets forth the audit penalty schedules in compliance with the new requirements of Labor Code section 129.5.

Specific Purpose of Proposed Section 10111.2:

Proposed section 10111.2 sets forth the audit penalty schedules in compliance with the new requirements of Labor Code section 129.5. This section will apply to audits conducted on or after January 1, 2003. However, for violations in claims with dates of injury between January 1, 1990 and December 31, 1993, penalty amounts may not exceed the amounts that would be assessed pursuant to section 10111. For violations in claims with dates of injuries between January 1, 1994 and December 31, 2002, penalty amounts may not exceed the amounts that would be assessed pursuant to section 10111.1. The penalty amounts in proposed section 10111.2 are based on the type of violation, taking into consideration the lateness of an act or the monetary value of the failure to act. The section sets forth when and how mitigation of penalties will be determined

and applied. The section also provides how consideration of penalty amounts based on the size of the audit subject will be determined.

Necessity:

Effective 1/1/03, Labor Code section 129.5 requires audit penalties to be based on additional factors, including whether the audit subject has met or exceeded the profile audit review performance standard; whether a full compliance audit subject has met or exceeded the full compliance audit performance standard; and the size of the audit subject location. For full compliance audit penalties, Labor Code section 129.5 will allow the imposition of penalties up to \$40,000. No administrative penalties are to be imposed on audit subjects that pass the performance audit review. If an audit subject failed the performance audit review, but passes the full compliance audit, only penalties for unpaid or late paid compensation will be imposed.

Proposed section 10111.2 sets forth the audit penalty schedules in compliance with the new requirements of Labor Code section 129.5.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the CHSWC report on the DWC Audit Function, and input from the auditors who review claim files.

Business Impact:

Although the penalty amount for the most serious type of violations is increased to \$40,000, approximately 80% of claims administrators who are audited will not be subject to any penalties. Approximately 10% of the claims administrators who are audited will have decreased penalties. The increased penalties will apply only to the worst performers and largest audit subjects. Therefore, the regulation will not have a significant impact on business.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Amended Section 10113

Order to Show Cause re Assessment of Civil Penalty and Notice of Hearing

Problem Addressed:

Current regulation section 10113 sets forth the procedure regarding the issuance of an Order to Show Cause for an assessment of a civil penalty of up to \$100,000. Amended Labor Code section 129.5 (effective 1/1/03) provides that the Audit Unit shall file a complaint requesting the Administrator Director to issue an Order to Show Cause for the possible assessment of a civil penalty if a claims administrator fails to meet the full compliance audit performance standards in two consecutive full compliance audits.

Labor Code section 129.5 (effective 1/1/03), has also been amended to provide that the Administrative Director shall issue the Order to Show cause if he or she has reason to believe that an employer, insurer or third party claims administrator has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

Regulation section 10113 must therefore also be amended to comply with the change of the statutory language.

Current regulation section 10113 also provides that the hearing must be held not less than 60 days from the date the Order to Show Cause was served or mailed. The regulated community commented that it needed additional time in which to prepare for the hearing. Proposed regulation 10113 removes the requirement that the hearing be held in not less than 60 days from the date the Order to Show Cause is served.

Specific Purpose of Amended Section 10113:

In compliance with Labor Code section 129.5, amended section 10113 provides that the Audit Unit shall file a complaint requesting the Administrator Director to issue an Order to Show Cause for the possible assessment of a civil penalty if a claims administrator fails to meet the full compliance audit performance standards in two consecutive full compliance audits. Also in compliance with the amended language of Labor Code section 129.5, section 10113 provides that the Administrative Director shall issue the Order to Show cause if he or she has reason to believe that an employer, insurer or third party claims administrator has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e). The regulation also defines that the \$100,000 civil penalty applies per adjusting location.

Necessity:

Regulation section 10113, which sets forth the procedure regarding the issuance of an Order to Show Cause for an assessment of a civil penalty of up to \$100,000, needs to be amended in order to comply with the changes in Labor Code section 129.5. In compliance with Labor Code section 129.5 (effective 1/1/03), amended section 10113 provides that the Audit Unit shall file a complaint requesting the Administrative Director to issue an Order to Show Cause for the possible assessment of a civil penalty if a claims administrator fails to meet the full compliance audit performance standards in two consecutive full compliance audits.

Labor Code section 129.5 (effective 1/1/03), has also been amended to provide that the Administrative Director shall issue the Order to Show Cause if he or she has reason to believe that an employer, insurer or third party claims administrator has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e). Regulation section 10113 must therefore also be amended to comply with the change of the statutory language.

Additionally, the regulated community has commented that it needs more than 60 days in which to prepare for the hearing.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the CHSWC report on the DWC Audit Function, and input from the auditors who review claim files.

Business Impact:

Because the proposed changes pertain to the burden of proof required at a hearing to assess a civil penalty, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Proposed Section 10113.1

Answer to Order to Show Cause

Problem Addressed:

Current regulations do not require the audit subject to respond to the Order to Show Cause re Assessment of a Civil Penalty prior to appearing at the hearing. The proposed regulation requires the audit subject to serve an Answer admitting or denying the allegations in the Order and to set forth any affirmative defenses. This will allow the parties and the hearing officer to determine what issues will need to be decided at the hearing.

Specific Purpose of Proposed Section 10113.1:

The purpose of this proposed section is to provide the procedure for answering the Order to Show Cause re Assessment of Civil Penalty.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) allows the Administrator Director to assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

Proposed regulation 10113.1 provides one step of the procedure concerning the civil penalty hearing: it requires that the audit subject file an answer, which will allow the parties to determine which issues are disputed.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

Because the proposed regulation requires the audit subject to file an Answer to the Order to Show Cause re Assessment of a Civil Penalty, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

**Proposed Section 10113.2 Amended Complaint or Supplemental Order
to Show Cause Before Submission of Case**

Problem Addressed:

Current regulations do not require the audit subject to respond to the Order to Show Cause re Assessment of a Civil Penalty prior to appearing at the hearing, nor do they address amending or supplementing the Order to Show Cause upon the discovery of additional information or facts prior to the hearing. If new or additional information is discovered that affects the Order to Show Cause, the Administrative Director needs to be able to amend the Order, and the audit subject should be allowed to file an amended Answer responding to the new allegations.

Specific Purpose of Proposed Section 10113.2:

The purpose of this proposed section is to provide the procedure for amending or supplementing the Order to Show Cause re Assessment of Civil Penalty and to allow the audit subject to file an Amended Answer to the new charges contained in the Amended Order.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) allows the Administrator Director to assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

Proposed regulation 10113.2 provides the procedure for amending or supplementing the Order to Show Cause re Assessment of Civil Penalty and to allow the audit subject to file an Amended Answer to the new charges contained in the Amended Order. This will allow the parties to determine which issues are disputed prior to appearing at the hearing.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing

officer for a prior civil penalty dispute. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

Because proposed regulation 10113.2 provides the procedure for amending or supplementing the Order to Show Cause re Assessment of Civil Penalty and to allow the audit subject to file an Amended Answer to the new charges contained in the Amended Order, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

**Proposed Section 10113.3 Administrative Director's Designation of
Hearing Officer**

Problem Addressed:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. Pursuant to Labor Code section 133, the Administrative Director has the power and jurisdiction to appoint a hearing officer to conduct the hearing. Current regulation section 10114 provides, among other things, that the Administrative Director may appoint a hearing officer. The current regulation will now be broken down into smaller sections in order to better organize and clarify the procedures pertaining to the civil penalty hearing. This proposed section will allow the Administrative Director to delegate authority to a hearing officer with regard to conducting a hearing to determine whether or not to assess a civil penalty.

Specific Purpose of Proposed Section 10113.3:

The purpose of this proposed section is to allow the Administrative Director to delegate authority to a hearing officer to conduct a civil penalty hearing. The section defines what authority the hearing officer will have.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) allows the Administrator Director assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

Pursuant to Labor Code section 133, the Administrative Director has the power and jurisdiction to appoint a hearing officer to conduct the hearing. Current regulation section 10114 provides, among other things, that the Administrative Director may appoint a hearing officer.

This proposed section will allow the Administrative Director to delegate authority to a hearing officer with regard to conducting a hearing to determine whether or not to assess a civil penalty.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its web site to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

Because this proposed section will allow the Administrative Director to delegate authority to a hearing officer with regard to conducting a hearing to determine whether or not to assess a civil penalty, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Proposed Section 10113.4 Written Statement and Supporting Evidence

Problem Addressed:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. At present there is no requirement for the audit subject to file a written statement or to provide a list of witnesses or produce the evidence it intends to rely on prior to the hearing. This requirement will clarify the procedure and help the parties and hearing officer determine what issues are in dispute and what evidence will be produced prior to the hearing.

Specific Purpose of Proposed Section 10113.4:

This proposed section sets forth the procedure concerning the filing of a written statement which must specify the legal and factual bases for the Answer. The written statement shall also contain a list of all witness and copies of all documents that the claims administrator intends on introducing into evidence at the hearing.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) allows the Administrator Director assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

At present there is no requirement for the audit subject to file a written statement or to provide a list of witnesses or produce the evidence it intends to rely on prior to the hearing. This requirement will clarify the procedure and help the parties and hearing officer determine what issues are in dispute and what evidence will be produced prior to the hearing.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

Because this regulation requires an audit subject to file a written statement prior to a civil penalty hearing, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

**Proposed Section 10113.5 Prehearing Conference; Subject Matter;
Prehearing Order**

Problem Addressed:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. At present there is no regulation requiring a prehearing conference. This requirement may resolve some disputes prior to the hearing and will help streamline and shorten the hearing itself.

Specific Purpose of Proposed Section 10113.5:

Proposed section 10113.5 sets forth the procedures regarding the prehearing conference.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) allows the Administrator Director assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

At present there is no regulation requiring a prehearing conference. This requirement may resolve some disputes prior to the hearing and will help streamline and shorten the hearing itself.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

Because proposed section 10113.5 sets forth the procedures regarding the prehearing conference, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Proposed Section 10113.6 Subpoenas

Problem Addressed:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. Current regulation 10114(b) provides, among other things, that the Administrative Director or hearing officer may issue subpoenas for the attendance of persons and the production of documents at the hearing. The current regulation will now be broken down into smaller sections in order to better organize and clarify the procedures pertaining to the civil penalty hearing. This proposed section will allow the Administrative Director or the hearing officer to issue subpoenas for the attendance of persons and the production of documents.

Specific Purpose of Proposed Section 10113.6:

This proposed section provides that the Administrative Director may issue subpoenas for the attendance of persons and the production of documents.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) allows the Administrator Director assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

Current regulation 10114(b) provides, among other things, that the Administrative Director or hearing officer may issue subpoenas for the attendance of persons and the production of documents at the hearing. The current regulation will now be broken down into smaller sections in order to better organize and clarify the procedures pertaining to the civil penalty hearing. This proposed section will allow the Administrative Director or the hearing officer to

issue subpoenas for the attendance of persons and the production of documents.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

Because current regulation section 10114(b) already authorizes the Administrative Director to issue subpoenas, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Amended Section 10114 Hearing

Problem Addressed:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. Current regulation 10114 sets forth procedures for the hearing and determination. However, the current regulation will now be broken down into smaller sections in order to better organize and clarify the procedures pertaining to the civil penalty hearing. Additionally, Labor Code section 129.5 (effective 1/1/03) was amended to state that any claims administrator that fails to meet the full compliance audit performance standards in two consecutive full compliance audits shall be rebuttably presumed to have engaged in a general business practice of discharging and administering its compensation obligations in a manner causing injury to those dealing with it. In all other cases, the Audit Unit will have the burden to prove a prima facie case that a violation of Labor Code section 129.5(e) occurred.

Specific Purpose of Amended Section 10114:

This section sets forth the procedure for the civil penalty hearing. In compliance with Labor Code section 129.5 (effective 1/1/03), it also sets forth that any claims administrator that fails to meet the full compliance audit performance standards in two consecutive full compliance audits shall be rebuttably presumed to have engaged in a general business practice of discharging and administering its compensation obligations in a manner causing injury to those dealing with it.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) allows the Administrator Director to assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

Labor Code section 129.5 (effective 1/1/03), it also sets forth that any claims administrator that fails to meet the full compliance audit performance standards in two consecutive full compliance audits shall be rebuttably presumed to have engaged in a general business practice of discharging and administering its compensation obligations in a manner causing injury to those dealing with it.

Current regulation 10114 sets forth the procedure for a civil penalty hearing and determination. The amended section complies with the amended language of Labor Code section 129.5. In addition, the current regulation will now be broken down into smaller sections in order to better organize and clarify the procedures pertaining to the civil penalty hearing.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

Because the amended section pertains to the burden of proof at the civil penalty hearing, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Proposed Section 10114.1 Evidence; Examination of Witnesses

Problem Addressed:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. Current regulation 10114 sets forth procedures for the hearing and determination. However, the current regulation will now be broken down into smaller sections in order to better organize and clarify the procedures pertaining to the civil penalty hearing. The proposed section addresses procedures concerning evidence and examination of witnesses.

Specific Purpose of Proposed Section 10114.1:

This section provides the rules pertaining to the introduction of evidence at a hearing.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) authorizes the Administrator Director to assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

Current regulation 10114 sets forth the procedure for a civil penalty hearing and determination. The current regulation will now be broken down into smaller sections in order to better organize and clarify the procedures pertaining to the civil penalty hearing. This section provides the rules pertaining to the introduction of evidence at a hearing.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its web site to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute. The division did not rely on technical,

theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

Because this section provides the rules pertaining to the introduction of evidence at a civil penalty hearing, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Proposed Section 10114.2 Affidavits

Problem Addressed:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. Current regulation 10114 sets forth procedures for the hearing and determination. However, the current regulation will now be broken down into smaller sections in order to better organize and clarify the procedures pertaining to the civil penalty hearing. The proposed section allows for the introduction of witness statements (under certain conditions) instead of requiring the witness to testify in person. By creating this procedure, the parties (and witnesses) will be able to save costs and time.

Specific Purpose of Proposed Section 10114.2:

This section allows for a witness' declaration to be introduced into evidence provided that the witness was listed on the written statement, the declaration is made under penalty of perjury, copies of the declaration are provided to the parties at least twenty days before the hearing, and the opposing party has not demanded that the witness appear in person.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) authorizes the Administrator Director to assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer

has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

Current regulation 10114 sets forth the procedure for a civil penalty hearing and determination. The current regulation will now be broken down into smaller sections in order to better organize and clarify the procedures pertaining to the civil penalty hearing. The proposed section allows for the introduction of witness statements (under certain conditions) instead of requiring the witness to testify in person. By creating this procedure, the parties (and witnesses) will be able to save costs and time.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

The submission of a witness affidavit at a hearing instead of requiring live testimony will save costs for all parties. Therefore, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Proposed Section 10114.3 Oaths

Problem Addressed:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. Current regulation 10114 sets forth procedures for the hearing and determination. Current regulation 10114 and proposed regulation 10114.3 state that oral evidence shall be taken only on oath

or affirmation. Therefore, the Administrative Director or the hearing officer must be authorized to administer oaths.

Specific Purpose of Proposed Section 10114.3:

This section authorizes the Administrative Director or designated hearing officer to administer oaths.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) authorizes the Administrator Director to assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

Current regulation 10114 sets forth procedures for the hearing and determination. Current regulation 10114 and proposed regulation 10114.1 state that oral evidence shall be taken only on oath or affirmation. Therefore, the Administrative Director or the hearing officer must be authorized to administer oaths.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

As proposed regulation section 10114.3 will authorize the Administrative Director to administer oaths, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Proposed Section 10114.4 Determination

Problem Addressed:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. Labor Code section 129.5(g) (effective 1/1/03) has changed the procedure for appealing the Determination regarding the assessment of a civil penalty. Proposed section 10114.4 complies with the change in the statute.

Specific Purpose of Proposed Section 10114.4:

This proposed section requires the Administrative Director to issue a written Determination setting forth the basis for the Determination. It also sets forth the procedure for service of the Determination and when the Determination will become final.

Necessity:

Labor Code section 129.5(e) (effective 1/1/03) authorizes the Administrator Director to assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third-party administrator for an employer has knowingly committed or performed any of the practices set forth in Labor Code 129.5(e).

Current regulation 10114 sets forth procedures for the hearing and determination. Labor Code section 129.5(g) (effective 1/1/03) has changed the procedure for appealing the Determination regarding the assessment of a civil penalty. Proposed section 10114.4 complies with the change in the statute.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division also relied upon the recommendations of a workers' compensation administrative law judge who was the designated hearing officer for a prior civil penalty dispute. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this regulation.

Business Impact:

Because the proposed regulation sets forth the change in procedure for appealing an assessment of a civil penalty, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

**Amended Section 10115.1 Appeal of Notice of Penalty Assessment –
Filing and Contents**

Problem Addressed:

Labor Code section 129.5 (a) provides that the Administrative Director may assess an administrative penalty. Labor Code section 129 (d) provides that the notice of penalty assessment shall become final unless contested within 15 days. Current regulation 10115.1 provides the procedure for appealing the notice of penalty assessment. As presently written, the current regulation is confusing. The proposed amended section consists only of grammatical changes, which will make the regulation easier to read and reduce confusion or disputes.

Specific Purpose of Amended Section 10115.1:

This section sets forth the procedure for appealing a Notice of Penalty Assessment. The proposed amendments are grammatical changes only, proposed in order to clarify the section.

Necessity:

Labor Code section 129.5 (a) provides that the Administrative Director may assess an administrative penalty. Labor Code section 129 (d) provides that the notice of penalty assessment shall become final unless contested within 15 days. Current regulation 10115.1 provides the procedure for appealing the notice of penalty assessment. The proposed amended section consists only of grammatical changes, which will make the regulation easier to read and reduce confusion or disputes.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing this amended regulation.

Business Impact:

Because the changes to the regulation are grammatical, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.

Repeal of Section 10115.3 Appeal of Civil Penalty

Problem Addressed:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. Labor Code section 129.5(g) (effective 1/1/03) has changed the procedure for appealing the Determination regarding the assessment of a civil penalty. Therefore, this section, which no longer complies with the Labor Code, will be repealed. The procedure to appeal an assessment of a civil penalty will be found in regulation section 10953.

Specific Purpose of Repealing Section 10115.3:

Section 10115.3, which set forth the procedure for appealing an assessment of a civil penalty, no longer complies with Labor Code section 129.5(g) (effective 1/1/03).

Necessity:

Labor Code section 129.5 requires that the Administrative Director conduct a hearing prior to assessing a civil penalty. Labor Code section 129.5(g) (effective 1/1/03) has changed the procedure for appealing the Determination regarding the assessment of a civil penalty. Therefore, this section, which no longer complies with the Labor Code, will be repealed. The procedure to appeal an assessment of a civil penalty will be found in regulation section 10953.

Technical, Theoretical, and/or Empirical Study, Reports or Documents:

The Division of Workers' Compensation met with the Audit Advisory Committee and posted drafts of the proposed section on its website to allow for pre-notice public comment. The division did not rely on technical, theoretical, or empirical studies, reports or documents in proposing the repeal of this regulation.

Business Impact:

This regulation will be repealed because the procedure for appealing an assessment of a civil penalty has changed. Therefore, the regulation will not have a significant impact on businesses.

Specific Technologies or Equipment:

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.